

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION NO. 7227 of 2000

WITH

CRIMINAL MISC. APPLICATION NO. 7228 OF 2000

WITH

CRIMINAL MISC. APPLICATION NO. 7229 OF 2000

WITH

CRIMINAL MISC. APPLICATION NO. 7230 OF 2000

WITH

CRIMINAL MISC. APPLICATION NO. 7231 OF 2000

WITH

CRIMINAL MISC. APPLICATION NO. 7232 OF 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

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NILESH LALIT PAREKH EX-MANAGING DIRECTOR ENARAI FINANCE LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 7227 of 2000

MR K.S.NANAVATY, LEARNED SENIOR COUNSEL with

MR DV PARIKH for the Petitioner

MR A.D.OZA, PP for Respondent No. 1

MR NILESH SHAH with MR MAYANK DESAI

for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 16/08/2002

COMMON ORAL JUDGEMENT

In this batch of six petitions filed under Section 482 of the Code of Criminal Procedure ('the Code' for short), the petitioner against whom six separate complaints, being Criminal Case Nos. 340 of 2000, 668 of 1999, 341 of 2000, 657 of 2000, 659 of 2000 and 658 of 2000 filed in the Court of learned JMFC. Vadodara by the respondent No.2 herein for commission of the alleged offences under Sections 406, 420, 120(b) and 114 of the IPC, and the process issued thereunder, has prayed to quash and set aside the said complaints and process issued thereunder.

2. Since common question of law and fact is involved in this batch of petitions, by the consent of the learned advocates appearing for the parties, all the petitions have been heard together and decided by this common judgement and order.

3. In order to appreciate the controversies raised in this batch of petitions, it would be advantageous to refer to the facts stated in Misc. Criminal Application No. 7227 of 2002 which is arising out of the Criminal Case No. 340 of 2000 filed in the Court of learned JMFC, Vadodara.

4. Criminal Case No. 340 of 2000 is filed in the Court of learned JMFC, Vadodara by respondent No.2 against the present petitioner and one Paresh Sethia, Branch Manager of Enarai Finance Limited for commission of the alleged offences under Sections 406, 420, 120(b) and 114 of the IPC, wherein, inter alia, it is alleged that the petitioner is the Managing Director of Enarai

Finance Limited and one Paresh Sethia, who is shown as accused No.2 in the complaint is the Branch Manager of Enarai Finance Limited. They issued alluring and deceptive advertisement in the local News Paper inviting the deposits of the public vide various schemes yielding higher rate of interest (Monthly, Quarterly and Yearly), and pursuant thereto, respondent No.2 has invested Rs. 13000/- (Rupees Thirteen thousand only) in Fixed Deposit for a period of one year on January 17, 1997 which was to be matured on January 17, 1998. The petitioner could not repay the said amount as per the terms and conditions of the said fixed deposit which was matured on January 17, 1998, and on demand being made by respondent No.2, threat was given to him by the petitioner, therefore, it is alleged in the complaint that the petitioner has cheated, committed criminal breach of trust and cheating, and thereby committed offence under Sections 406 and 420 read with Sections 120-(b) and 114 of the IPC. On the said complaint, the learned Magistrate, after recording verification of the complainant issued process against the present petitioner as well as Paresh Sethia, which has given rise to the present batch of petitions at the instance of accused No. 1, who is the petitioner before this Court, wherein the prayer made is to quash the complaints filed against him and the process issued thereunder.

5. By filing this batch of petitions, it is, inter alia stated that Enarai Investment & Consultancy Services (India) Private Limited was incorporated on March 30, 1985. The company, thereafter was converted into a Public Limited Company. The company entered in the field of financial services, including leasing, hire purchase, auto finance, bills discounting and inter-corporate fund management and deposits, merchant banking including issue management underwriting and investment banking. In May, 1993, the company received the authorisation from the Securities And Exchange Board of India (SEBI) as Category-I Merchant banker. Up to March 31, 1997, the company enjoyed financial prosperity and was a profitable company.

5.1 As a part of its fund based activities, the company provided lease and hire purchase finance for the acquisition of plant and machinery, cars and consumer durables, etc. For this purpose and for its other fund based activities, the company had raised resources by way of increase of capital, borrowing funds, issue of non-convertible debentures, bank finance (the company enjoyed facilities from the Bank of Baroda, Bank of India, Dena Bank, Canara Bank and the Bank of

Maharashtra). The company also raised funds by way of acceptance of fixed deposits. The funds raised were deployed both in short term and long term assets including incorporate deposits, bills, leasing and hire purchase. The tenure of the short term assets ranged between 3 and 6 months while that of the long term assets was between 3 and 5 years.

5.2 Since April, 1997, the company started facing several difficulties. The general recessionary trend witnessed all over the world including in India, had an adverse impact, particularly in the field of finance. The severe liquidity crunch that adversely affected the Indian economy also had its impact on the company. Due to depressed capital and money market conditions in non-banking financial companies, the company found it extremely difficult to raise additional resources both either by way of loans or by increase of additional capital.

5.3 In view of the aforesaid, the company defaulted on repayment of fixed deposits that had matured. As a result of the aforesaid difficulties, the fixed deposit programme of the company was downgraded by CRISIL to a credit rating of "FA minus" to "FD". In view of this and pursuant to the directions issued by the Reserve Bank of India on January 2, 1998 and thereafter, the company is debarred from accepting but is permitted to renew the fixed deposits. This further precipitated the problems faced by the company and adversely affected the mobilization of resources by the company from other sources.

5.4 The majority of the fixed deposits liabilities of the company were due between October 1997 and March 1998. Approximately 55% of the outstanding deposits fell due for repayment during the period from October 1997 to March 1998.

5.5 In view of the default as aforesaid committed by the company, the depositors started filing applications for repayment of their deposits before the Company Law Board, Western Region Bench, Mumbai under Section 58A (q) which is perquesterially the same as Section 45 QA(2) of the Reserve Bank of India Act, 1934. In pursuance of the receipt of the various applications, Company Law Board, invoked suo motu powers vested in the said Board to order repayment of all the matured deposits, whether applications have been filed or not with the Board by the deposit holders as provided under Section 45 QA (2) of the Reserve Bank of India Act, 1934. The company was

directed to file projection based on various alternatives for repayment of the deposits with cash flow projection duly certified by the Chartered Accountant. Pursuant to the directions given, the company furnished various alternatives from time to time and the same were considered and also discussed during the course of various hearings held before the Company Law Board. Out of the various alternatives furnished by the company, those which were found favourable were directed to be circulated as also to give public notice in two daily news papers, the programme of repayment of the deposits to the depositors whose deposits remained unpaid as on March 31, 1998 which includes the fixed deposits by the complainants.

5.6 The respondent No.2 herein was also one of the persons who made deposits with the said company. Because of financial constraint and as the matter was pending before the Company Law Board, the alleged amount could not be refunded to respondent No.2 which was also brought to the notice of the respondent No.2 that the matter was pending before the Company Law Board and action will be taken in accordance with the order of the Board. It is denied that the company or any of the officer of the company behaved irresponsibly or roughly with respondent No.2 as alleged. The order passed by the Company Law Board was challenged before the High Court of Mumbai by one Aruna Dholakia, and the High Court of Mumbai, vide order dated November 27, 1998 quashed the order and remanded the matter. Meanwhile, pursuant to the winding up petitions filed against the company, the company was wound up vide order dated April 26, 1999 passed by the High Court of Mumbai. Therefore, according to the petitioner, it is in such circumstances, despite there being no intention to defraud and despite the fact that the allegations at best make out a civil dispute that the said complaint was filed by respondent No.2 herein, wherein the process has been duly issued. It is these complaints and the issuance of the process in the said proceedings which the petitioner has impugned in the present batch of petitions under Articles 226/227 of the Constitution of India read with Section 482 of the Code for quashing the said complaints and the process issued therein to prevent abuse of process of Court, and to meet the ends of justice.

6. It may be noted that no reply affidavit is filed by respondent No.2-original complaint controverting the averments made in the petition, and therefore, the averments made in the petition go unchallenged.

7. I have heard Mr.K.S.Nanavaty, learned Sr. Counsel for the petitioner, Mr. A.D.Oza, learned PP for respondent No.1 State of Gujarat and Mr.Nilesh Shah, learned advocate for respondent No.2-original complainant. I have also considered the averments made in the memo of the petitions and the allegations made in the impugned complaints.

8. On the facts and in the circumstances emerging from the record of the case, following aspects have remained unchallenged and unassailable which are incapable of being disputed by respondent No.2-original complainants of each petitions:-

- i) The complainants are all members of one family.
They are respectively Anita Ashok Palkar, Ashok Keshavrao Palkar, Sachin Ashok Palkar, Nila Nandkumar Palkar and Shila Sharadchandra Pradhan.
- ii) The applicant was the Managing Director of a Public Limited Company M/s Enarai Finance Limited which is a widely held Public Limited Company registered with Stock Exchange as well as with the Reserve Bank of India as being a non-banking finance corporation. The company enjoyed very good financial health till March, 1997. The company was doing business since more than a decade and on various occasions, accepted deposits, paid substantial interest and redeemed deposits from time to time. As a matter of fact, between March and December 1997, the company paid 14 crores of rupees to its depositors.
- iii) On January 2, 1998, the Reserve Bank issued a circular noting shifting in policy whereby the companies below certain credit rating were not permitted to accept fresh deposits or renew the same. This clearly led to financial cycle of liquidity being broken. This fact was notified vide letter dated January 12, 1998 (Annexure-F to the petition) by the company to various depositors including the present complainants.
- iv) Deposits of the present complainants were accepted on January 17, 1997 and were to mature on January 17, 1998.
- v) In light of adverse financial climate and in light of shifting in RBI policy, the company defaulted in repayment of deposits from October 1997.

vi) In the meantime, more than 1000 depositors filed applications before the Company Law Board in light of the said default. The first hearing thereof was fixed on March 3, 1998. Even at that stage, the Company Law Board took note of the fact that the company was earlier making profit and had repaid to substantial depositors. But due to shifting in RBI policy, there was default in repayment. As is clear from the order of the Company Law Board at Annexure-C to the petition and more particularly para 9 thereof, the Company Law Board was considering non-payment of deposits which had matured on March 31, 1998. This, therefore, clearly included the present deposits for which complaints have been filed. As per para 4 of the said order, the Company Law Board exercised its suo motu power (para 11.1 of the order) under Section 45QA (ii) of the RBI Act, 1934 and directed that this order would apply not only to those applicants who were present before it but all depositors of the company, whether or not they had been heard or filed applications before it. Various schemes submitted by the company for repayment were considered and the next date of hearing was fixed on June 18, 1998. As per para 5 of the said order, the company was directed to give a public notice in two daily newspapers and also to broadly circulate next date of hearing to all the depositors so that they may be heard at large.

vii) Apart from giving public notice, the company addressed its letter dated May 12, 1998 about next date of hearing of the Company Law Board (Annexure-A to the petition) even to the present complainants.

viii) More than 150 depositors remained present and were heard as is clear from para 6.2 of the order. As is clear from paras 6.2 and 7, RBI, in the meantime, had granted certain interim stay against the company restraining the company from alienating its assets except for the purpose of repayment of matured fixed deposits. As is clear from para 7, RBI also examined the company's proposals and made its suggestions. As is clear from paras 8 to 10 of the said order, accounts and balance sheets of the company and its financial position were looked at in details by the Company Law Board and it was found as per para 9.2 that the company would not be able to

meet its liability due to its adverse financial position. Having regard to the company's cash flow projections and after considering the suggestions of RBI, certain directions of repayment were provided for in para 12 of the said order.

- ix) The said order of the Company Law Board dated August 12, 1998 was also duly circulated to the complainants and other depositors vide letter dated September 4, 1998 (Annexure-B to the petition).
- x) All the aforesaid letters dated January 12, 1998, May 12, 1998 and September 4, 1998 are admitted and referred to in the complaint No. 668 of 1999 (Misc. Criminal Application No. 7228 of 2000).
- xi) Bombay High Court, however, quashed the order of the Company Law Board vide its order dated November 27, 1998. Further more, vide order dated April 26, 1999 (Annexure-D to the petition), Bombay High Court ordered winding up of the company and further ordered Official Liquidator to be appointed as Provisional Liquidator of the company.
- xii) Any claim can now be lodged only against the Liquidator of the company.
- xiii) The aforesaid facts demonstrate beyond doubt that the present dispute is of a civil nature. As a matter of fact, the Company Law Board as well as RBI which are appropriate forums have considered repayment and complaints of the depositors and have specifically found that the company was earlier financially healthy, but subsequently is not in a position to repay its depositors owing to its deteriorating financial condition and change in RBI policy. As is clear from the order of the Company Law Board, it was dealing with all deposits that were matured before March 31, 1998. This would clearly indicate deposits of the present complainants. When the Company Law Board was considering this very issue in exercise of its suo motu power with regard to repayment of deposits including that of the complainants, it can hardly be held that the company did not repay deposits with a preexisting intention to never repay them. Further more, this is a case of public deposits being invited and not just

question of individual dealings wherein there could have been any preexisting intention not to repay the deposits. In any view of the matter, when RBI and Company Law Board have specifically found that deposits have not been repaid owing to poor financial position of the company which was subsequently wound up, the question of even assuming that there was no intention to repay the deposits on the part of the company and its officers as and when deposits were invited and received, does not arise.

9. In the aforesaid backdrop of the factual aspects which have remained uncontroverted, the question which falls for determination of this Court is as to whether offences as alleged under Sections 406 and 420 of the IPC are committed by the petitioner or not.

10. In this connection, it would be appropriate to refer to the ingredients which are necessary to constitute offence under Section 406 of the IPC.

11. The following are the ingredients to constitute offence under Section 406 of the IPC. The prosecution must prove:

- i) that the accused was entrusted with property or with dominion over it.
- ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

12. To constitute an offence under Section 406 and 420 of the IPC, the prosecution must prove the following:

- a) to deliver any property to any person, or
- b) to consent that any person shall retain any property, or
- c) to make, alter or destroy the whole or any part of a valuable security, or
- d) to make, alter or destroy anything which is signed or sealed and which is capable of being converted into a valuable security.

13. Now, on having fair look to the averments made in the complaints filed by respondent No.2 against the

petitioner, and in view of the uncontroverted and unassailable aspects which have been adverted in the preceding paragraphs, there is no manner of doubt that there was no intention on the part of the petitioner to commit criminal breach of trust or to deliver the property by cheating and dishonest inducement. This is clearly a civil dispute inasmuch as the company has not been able to repay the deposits owing to its poor financial position as found by the Company Law Board as well as RBI.

14. In the case of S.N.PALANITKAR AND OTHERS V. STATE OF BIHAR AND ANOTHER, 2001 AIR SCW 4435, the Supreme Court has said that when there is nothing either in the complaint and/or in the sworn statements of complainant and witnesses that any property was entrusted to any of the accused at all or the accused had domain over any of the properties of complainant which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405, it cannot be said that accused committed offence under Section 405. The Supreme Court has further said that for constituting offence under Section 420, that is, cheating, intention to deceive should be in existence at time when inducement was made and mere failure to keep up promise subsequently cannot be presumed as leading to cheating, and ultimately, in the said case, Supreme Court in exercise of the powers conferred under Section 482 of the Code, quashed the complaint and the process issued thereon against the accused by saying that the alleged acts against the accused was not constituting alleged offences for want of satisfying ingredients of offences.

15. It is settled proposition of law that Section 482 of the Code empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken either by the Magistrate or the Investigating Officer it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code.

16. Applying the principles enunciated by the Supreme Court in above referred to judgement and the settled proposition of law on quashment of complaint under Section 482 of the Code, which empowers the High Court to exercise its inherent powers to prevent the abuse of

process of the Court and the factual aspects which have remained unchallenged and unassailable which have been referred to in the preceding paragraphs at length, at the cost of repetition, be it stated that FIR does not disclose commission of any offence as alleged against the petitioner as the ingredients to constitute the offence under Sections 406 and 420 are absent as there was no intention to commit criminal breach of trust or to deliver the property by cheating and dishonest inducement on the part of the petitioner.

17. Seen in the above context, all the impugned complaints filed in the Court of learned JMFC, Vadodara and the process issued thereunder which are challenged in this batch of petitions deserve to be quashed and set aside by allowing this batch of petitions.

18. For the foregoing reasons, all the petitions succeed and accordingly they are allowed. Resultantly, all the impugned complaints filed in the Court of learned JMFC, Vadodara and the process issued thereunder are hereby quashed and set aside.

Rule is made absolute in all the petitions.

(A.M.Kapadia, J)

Jayanti*